No. 29339 - Helen Foster, individually and as the Executrix of the Estate of Hoy Dale Foster, deceased v. Hossein Sakhai, M.D.

FILED
December 12, 2001
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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Davis, J., concurring in part and dissenting in part:

Two of the three rulings in the majority opinion are simply wrong. Therefore, I concur in part and dissent in part. Before discussing the grounds upon which I dissent, I note that the defendant in this case, Dr. Hossein Sakhai, initially argued that this appeal should be denied because it was appealed from an order granting a new trial, which was not a "final order" for appeal purposes. The majority opinion has disagreed and, based upon this Court's constitutional authority, determined that an order granting a new trial, while interlocutory, is an appealable order. I concur with the majority opinion on this procedural issue. However, I depart from the majority with respect to its resolution of two substantive issues raised by this appeal.

The trial court granted a new trial to Dr. Sakhai on the ground that counsel for the plaintiff improperly stated a damage "target" amount to the jury during closing arguments. The majority opinion concluded that the trial court committed error in granting a new trial. Additionally, Dr. Sakhai filed a cross-appeal arguing that the trial court should have granted his new trial based upon remarks by counsel for the plaintiff that were violative of a motion in limine. The majority opinion rejected this argument by Dr. Sakhai. I dissent from the latter two rulings by the majority opinion. In rendering its decision, the majority opinion has manipulated long-standing principles of law to reinstate the jury verdict in this case.

A. Counsel for Plaintiff Improperly Stated a Damage Target Amount to the Jury During Closing Arguments

Dr. Sakhai argued that the trial judge was correct in granting a new trial because counsel for the plaintiff improperly stated that a million dollars for noneconomic damages was the "target" amount for the jury. The majority opinion rejected the argument after concluding "that the jury was adequately instructed to understand that the million dollar figure represented an absolute upper limit, and not a 'target.'" This conclusion by the majority opinion is wrong. Furthermore, the majority opinion distorted what actually occurred.

To begin, counsel for the plaintiff made the following statement to the jury during closing arguments:

> Counsel for Plaintiff: The vision would certainly be included in loss of enjoyment of life, mental anguish, the fright he had to go through with the second surgery, and the Court has instructed that whatever those items you have, a million dollars is the total. It cannot be above a million dollars, *so that's the target*[.]

(Emphasis added). Clearly, counsel for plaintiff went beyond the trial court's instruction and informed the jury that a million dollars was the "target."

Immediately after plaintiff's counsel concluded his closing argument, defense counsel moved for a mistrial. The following exchange occurred at the bench.

> Judge: Well, I'm not going to declare a mistrial. I may have to take this up in--What concerned me, quite frankly, more was the discussion of the statutory limit of a million dollars and saying, "That's the target." That suggests an amount, and that does bother me.

Counsel for Plaintiff: Did I say, "That's the target."?

Judge: Yes, you did.

Counsel for Plaintiff: Did I correct it? Did I not--

Judge: No. You didn't correct it.

The evidence illustrates that counsel for the plaintiff misstated the trial judge's instruction on the million dollar cap and informed the jury that the sum was the "target." Counsel for the plaintiff even tried to argue that he was not aware that he spoke those words and questioned whether he clarified his words to the jury. In spite of the blatant evidence of what actually took place, the majority opinion concluded that counsel for the plaintiff did not state a "target" amount for the jury. I simply cannot accept the majority's decision to distort the record in order to reinstate a plaintiff verdict.

Our law is clear. Stating a target amount for a jury to return for noneconomic damages is "reversible error where the verdict is obviously influenced by such statement." Syl. pt. 7, in part, *Bennett v. 3 C Coal Co.*, 180 W. Va. 665, 379 S.E.2d 388 (1989). In the instant case, the trial court denied the motion for mistrial because it wanted to see if the improper target statement had prejudiced the jury. After the jury returned a verdict of $800,000, the trial court recognized that the remark was prejudicial and therefore granted the motion for a new trial. The trial court's decision was consistent with the law in this state and should not have been reversed.

In a case filed this term, *Lamphere v. Consolidated Rail Corporation*, ___ W. Va.

___, ___ S.E.2d ___ (No. 29691 November 30, 2001) (per curiam), this Court affirmed the decision of the trial judge in granting a new trial to the *plaintiff* after the jury returned a defense verdict. In affirming the trial court's decision in *Lamphere*, we recognized in syllabus point 1 of the opinion the longstanding principle of law that "'[a] trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion.'" Quoting Syl. pt. 3, in part, *In re State Pub. Bldg. Asbestos Litig.*, 193 W. Va. 119, 454 S.E.2d 413 (1994). *See also Lively v. Rufus*, 207 W. Va. 436, 440-441, 533 S.E.2d 662, 666-667 (2000); *Tennant v. Marion Health Care Foundation*, 194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995); Syl. pt. 4, *Sanders v. Georgia-Pacific Corp.*, 159 W. Va. 621, 225 S.E.2d 218 (1976). No abuse of discretion was shown in the instant proceeding to justify the majority's decision to reverse the new trial awarded in this case.

B. Counsel for the Plaintiff Violated a Motion In Limine Ruling by the Trial Judge

Prior to the trial in this case, the circuit court granted a motion in limine tendered by Dr. Sakhai. The motion in limine precluded any evidence or discussion to the jury regarding punitive damages. As grounds for his cross-appeal, Dr. Sakhai argued that the motion in limine order was violated. Consequently, the trial court should have granted his motion for a new trial. The majority opinion, after distorting what took place at trial, concluded that no basis existed for granting a new trial on this ground.

A review of the actual violation of the motion in limine order clearly established that a new trial should have been granted. The following occurred during closing argument by counsel for plaintiff.

> Counsel for Plaintiff: Do something in this case to compensate the Foster family. Do something to send a message--
>
> Counsel for Defendant: Objection.
>
> Judge: Your objection?
>
> Counsel for Defendant: It is a "send a message."
>
> Counsel for Plaintiff: May I finish?
>
> Judge: Yes, but if you're going to finish the sentence, don't pause in the middle of it quite so long.
>
> Counsel for Plaintiff: Do something–Compensate the Foster family and do something [to] send the message to Dr. Sakhai.
>
> Counsel for Defendant: Objection, Your Honor.
>
> Judge: Sustained. That's improper.

Clearly, counsel for plaintiff violated the motion in limine order by expressly suggesting to the jury to return a verdict that "would send a message."

On May 25, 2001, this Court filed the opinion of *Honaker v. Mahon*, 210 W. Va. 53, 552 S.E.2d 788 (2001). *Honake*r carved out principles of law relating to motions in limine. In *Honaker*, the plaintiff appealed an adverse jury verdict. One issue presented by the plaintiff on appeal was that the defendant introduced evidence in violation of the trial judge's ruling on a motion in limine. This Court crafted two syllabus points on the issue of a violation of a motion in limine order:

> 5. A deliberate and intentional violation of a trial court's ruling on a motion in limine, and thereby the intentional introduction of prejudicial evidence into a trial, is a ground for reversing a jury's verdict. However,

> in order for a violation of a trial court's evidentiary ruling to serve as the basis for a new trial, the ruling must be specific in its prohibitions, and the violation must be clear.
>
> 6. In deciding whether to set aside a jury's verdict due to a party's violation of a trial court's ruling on a motion in limine, a court should consider whether the evidence excluded by the court's order was deliberately introduced or solicited by the party, or whether the violation of the court's order was inadvertent. The violation of the court's ruling must have been reasonably calculated to cause, and probably did cause, the rendition of an improper judgment. A court should also consider the inflammatory nature of the violation such that a substantial right of the party seeking to set side the jury's verdict was prejudiced, and the likelihood that the violation created jury confusion, wasted the jury's time on collateral issues, or otherwise wasted scarce judicial resources. The court may also consider whether the violation could have been cured by a jury instruction to disregard the challenged evidence.

Syl. pts. 5 & 6, *Honaker*. In *Honaker*, we applied the above principles and reversed the adverse jury verdict and granted the plaintiff a new trial.

In the instant proceeding, Dr. Sakhai, as a *defendant*, now seeks the protection of *Honaker*. The majority opinion denied to Dr. Sakhai the well-reasoned principles of *Honaker*. Clearly, Dr. Sakhai has satisfied *Honaker*. The trial court issued a motion in limine order precluding evidence or argument to the jury on the issue of punishing Dr. Sakhai with a punitive verdict. Counsel for the plaintiff not only once, *but twice,* violated that order. The jury returned a verdict in an amount that can only be justified as punitive. In spite of this, the majority opinion has concluded that Dr. Sakhai, as a defendant, is not entitled to the benefits of *Honaker*. Our law must apply with equal force to both plaintiffs and defendants. We should not have two sets of rules -- one set of rules for plaintiffs and a different set of rules for defendants.

Based upon the foregoing, I respectfully concur in part and dissent in part. I am authorized to state that Justice Maynard joins me in this concurring and dissenting opinion.